

HOUSE BILL REPORT

ESHB 2842

As Passed House:
February 12, 2010

Title: An act relating to insurer receiverships.

Brief Description: Addressing confidentiality as it relates to insurer receivership.

Sponsors: House Committee on Financial Institutions & Insurance (originally sponsored by Representatives Parker, Kirby and Kenney; by request of Insurance Commissioner).

Brief History:

Committee Activity:

Financial Institutions & Insurance: 1/21/10 [DPS].

Floor Activity:

Passed House: 2/12/10, 96-1.

Brief Summary of Engrossed Substitute Bill

- Exempts documents and other information obtained by the Insurance Commissioner in his or her capacity as a receiver of an insurer from public records disclosure requirements.
- Provides that those records are records of the receivership court.

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Kirby, Chair; Kelley, Vice Chair; Bailey, Ranking Minority Member; Parker, Assistant Ranking Minority Member; Hurst, McCoy, Nelson, Roach, Rodne and Simpson.

Minority Report: Without recommendation. Signed by 1 member: Representative Santos.

Staff: Jon Hedegard (786-7127).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Insurance Commissioner (Commissioner) oversees the regulation of insurance in Washington. An important regulatory responsibility of the Commissioner is monitoring the solvency of insurers. The monitoring is achieved by the use of risk assessment formulas and various financial reporting requirements. If certain criteria are met, the Commissioner can apply for a court order for rehabilitation or liquidation of a domestic insurer (an insurer formed under the laws of Washington).

There are specific procedures to follow in the rehabilitation. One of the first steps in rehabilitation is the appointment of the Commissioner to take charge of the insurer by a superior court. The Commissioner, in turn, generally assigns a person or persons to manage the insurer and try to correct the solvency issues. If the court believes the concerns are resolved, the court can release the insurer from rehabilitation. If the court decides the insurer cannot be rehabilitated, it may order the Commissioner to liquidate the insurer.

A superior court will appoint the Commissioner as the liquidator to sell the insurer's assets and distribute the proceeds to insurer's claimants under the Uniform Insurers Liquidation Act (UILA).

In the UILA, "receiver" is defined to include "receiver, liquidator, rehabilitator, or conservator as the context may require."

The Public Records Act (PRA) requires that all state and local government agencies make all public records available for public inspection and copying unless they fall within certain statutory exemptions. Information produced by, obtained by, or disclosed to the Commissioner in the course of a financial or market conduct examination, financial analysis, or a market conduct desk audit is generally exempt from public disclosure requirements. There are several exceptions to this general exemption. One exception is records connected to allegations of official negligence or malfeasance.

If exempt information obtained in the course of a financial or market conduct examination, financial analysis, or a market conduct desk audit is connected to allegations of negligence or malfeasance by the Commissioner, then any person may petition a superior court in Washington for access to the information. In that case, the court must conduct an in-camera review after providing notice to the Commissioner and parties who provided information. The court may order the Commissioner to allow the petitioner access to the information; the petitioner must maintain its confidentiality. After conducting a hearing, the court may order disclosure of the information if the court finds that there is a public interest in disclosure and that exemption from disclosure is not necessary to protect any individual's right of privacy or any vital government function.

Summary of Engrossed Substitute Bill:

Documents and other information obtained by the Commissioner in the Commissioner's capacity as a receiver (whether the insurer is in rehabilitation or liquidation) remain private company documents and other information and are:

- confidential by law and privileged;
- records under the jurisdiction and control of the receivership court;
- not subject to the PRA or laws requiring the preservation of public records; and

- not subject to subpoena directed to the Commissioner or any person who received documents and other information while acting under the authority of the Commissioner.

The Commissioner may use such documents and other information to further any regulatory or legal action brought as a part of the Commissioner's official duties. The confidentiality and privilege related to those documents and other information is not waived if the information is shared with any person acting under the authority of the Commissioner, representatives of insurance guaranty associations, the National Association of Insurance Commissioners and its affiliates and subsidiaries, regulatory and law enforcement officials of other states and nations, the federal government, and international authorities.

The Commissioner and any person who received documents and other information while acting under the authority of the Commissioner as receiver is not required to testify in any private civil action concerning any confidential and privileged documents, materials, or information.

The confidentiality or privilege related to the records does not apply in any litigation to which the insurer in receivership is a party. If there is such litigation, the state's rules of civil procedure are the controlling authority regarding what must be disclosed.

Any person may file a motion in the receivership matter to allow inspection of private company documents and information otherwise not subject to review if the person can demonstrate:

- a legal interest in the receivership estate; or
- a reasonable suspicion of negligence or malfeasance by the Commissioner related to an insurer's receivership.

The court must conduct an in-camera review after notifying the Commissioner and every party that produced the documents and information. The court may order the Commissioner to allow the petitioner to have access to the documents and information, provided the petitioner maintains the confidentiality of the information. The petitioner must not disclose the information to any other person, except as ordered by the court.

After a hearing, the court may order that the information can be disclosed publicly if the court finds that there is a public interest in the disclosure of the information and protection of the information from public disclosure is clearly unnecessary to protect any individual's right of privacy, or any company's proprietary information, and the Commissioner has not demonstrated that disclosure would impair any vital governmental function, or the receiver's ability to manage the estate.

The PRA is amended to exempt the documents and materials from public disclosure requirements. The Commissioner is not required to comply with the requirements of the PRA regarding records that are under the control of a receivership court, unless ordered to do so by the receivership court.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The Commissioner is looking to protect the value of an insurer that is in receivership by protecting the insurer's records. The insurer's records are the property of that insurer and should not be treated as public records. The original approach of this bill was changed after discussions with stakeholders. The bill now is similar to existing sections in the Insurance Code. In the state and across the country, courts have traditionally held that the documents related to a receivership are the court's documents. An issue arose in a court on this subject. There was a records request from a person who was not a policyholder or claimant. The Commissioner had to produce 20 terabytes of electronic information and 13 boxes of hard copies. It took a tremendous amount of time and money. The Commissioner has overseen five receiverships in recent years. Three of those ended up with the company being fully rehabilitated. If the records are public and are disclosed, that can undercut the value of the company. The receiver will find it much more difficult to secure the interests of the claimants, policyholders, investors, and the company. If the company is successfully rehabilitated, those types of records would not be available to the public after the rehabilitation. The public release of those types of records could damage the company. The Commissioner believes that the bill is in line with the previous decades of court interpretations of applications of public disclosure requirements regarding receivership records. The Commissioner is very diligent in rehabilitating troubled insurers. Solvency regulation is one of the most important regulatory duties of the Commissioner. Insurers may have to contribute to pay the claims of an insolvent insurer through a guaranty fund. No insurer wants to have to pay for a competitor's failure. A receiver administers a private company. The involvement of the Commissioner should not make those private records available to the public. This codifies a long-standing interpretation of the law regarding the records of a receiver.

(With concerns) The bill contains many of the types of exemptions that the Commissioner uses to protect other records. In this scenario, an insurer has failed and is being run by a state employee. This doesn't happen with companies that are in businesses other than in the financial services area. In financial services, people are at a greater risk if there is a failure than in other types of businesses. Public records are records used, maintained, or held by a government agency. It is not clear that many of an insurer's records would fall under this definition. Records may be public records but also may be exempt or confidential. This bill allows no access under the PRA. The bill does not require these records to be retained by the Commissioner. Those records may not be available for subsequent Commissioners, auditors, and courts.

(Opposed) None.

Persons Testifying: (In support) Representative Parker, prime sponsor; Drew Bouton and Jim Odiorne, Office of the Insurance Commissioner; and Mel Sorensen, Property Casualty Insurance, Allstate Insurance and American Family Insurance.

(With concerns) Rowland Thompson, Allied Daily Newspapers and Washington Newspaper Publishers.

Persons Signed In To Testify But Not Testifying: None.